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MICHAEL RODAK, JR.,

In the Supreme Court of the United States

No. 74-346

FEDERAL PRESCRIPTION SERVICE, INC., AND DRIVEX CO.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, et al.,
Intervenors.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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FEDERAL PRESCRIPTION SERVICE, INC., AND DRIVEX CO.,
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AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, et al.,
Intervenors.

To the Honorable, the Chief Justice and Associate Justices:

Petition is hereby made for the issuance of a writ of certiorari to review a decision of the United States Court of Appeals for the Eighth Circuit. The questions here involved overlap the *Gissel* card majority bargaining order issues now pending before you in *Linden Lumber Division, Summer & Co.* v. *National Labor Relations Board, cert. granted* 42 U.S.L.W. 3594 (April 16, 1974) (No. 73-1231).

OPINIONS BELOW

The Eighth Circuit opinion is reported at 496 F. 2d 813. The National Labor Relations Board opinion is at 203 NLRB No. 145. Neither the oral opinion of the District Court of Iowa on the conviction of the Union nor the civil judgment against the Union in the Southern District of Iowa has been officially reported.

JURISDICTION

The judgment of the United States Court of Appeals was entered July 2, 1974. Review jurisdiction of this Court arises concurrently under 28 U.S.C. §1254, and 29 U.S.C. §§160(e), (f).

QUESTIONS PRESENTED

1. Whether a compulsory bargaining order is appropriate under *Gissel* in the absence of evidence of an adverse effect of the employers' unfair labor practices on the fairness of an election.

2. Whether the Board should compel bargaining with a union convicted of organizing coercion.

3. Whether an employer defending charges of unfair labor practices is denied due process by excluding its proffer of evidence of countervailing unfair labor practices of the Union.

STATUTES INVOLVED

29 U.S.C. §157. *Right of Employees as to Organization, Collective Bargaining, etc.*

29 U.S.C. §158. *Unfair Labor Practices.*

29 U.S.C. §159. *Representatives and Elections—Exclusive Representatives; Employees' Adjustment of Grievances Directly with Employer.*

29 U.S.C. §160. *Prevention of Unfair Labor Practices —Powers of Board Generally.*

Applicable sections of these statutes are printed in the Appendix (A1-3).[1]

STATEMENT OF THE CASE

The employer-petitioners are two corporations located in Madrid, Iowa. Federal fills medical prescriptions by mail under contract with national veteran and other organizations and the smaller Drivex operates a contract mailing service in a building across the street, principally for a Massey-Ferguson Co. Federal and Drivex are owned and managed by the same three men and no objection was made to their being treated as a unit for collective bargaining purposes.

Federal and Drivex employ locally available housewives and school girls, full and part time, paying only Fair

1. "A" references are to pages of the appendix bound herewith. "JA" references are to pages of the printed Joint Appendix filed in the Court of Appeals and refiled here as part of the record under Rule 21(a).

Labor Standards Act minimums for actual hours worked. As to the size of the operation, company records show 66 non-professionals employed at the end of the first quarter of 1970, and 75 for the same date in 1971 (A79).

The intervenor Union started its organization campaign at a meeting on March 9, 1971, where 36 cards were signed and on March 12 it demanded recognition by the employers as representing "a large majority of your employees" (JA117). The cards claimed were not offered for examination. The employers proposed and Union applied for, a statutory election to determine the question of representation (JA118). On April 2, 1971, following receipt of the first quarter's results, the employers let 10 employees go, nine from Federal, one from Drivex. Nine of the ten were signers of union cards.

On April 5, the ten terminees, joined by 25 other employees, went on strike. On April 20, the union and the employer stipulated for a "Certification Upon Consent Election" (JA2-3) which excluded the ten terminees and seven names withdrawn by the employers before agreement, and listed 65 employees as agreed unit voters.

On April 8, the employers were granted an injunction by the Iowa District Court against picket line violence (A10). During April and early May strike incidents occurred of mass picketing, pushing, name calling, threats, spikes, slashed tires, broken windows, car following, an apparent shooting, and a coincident incendiary device in a non-striker's trailer home. On May 8 contempt charges were filed by the employers, and, on June 1, the Union, its president, other organizers brought into Madrid by the Union, and four strikers, were convicted (A13).

The Board election was held on May 13. Fifty-seven employees voted without challenge, 25 for the Union and

32 against Union representation (JA4). Twenty-three additional ballots were challenged.[2] The Union moved to set the election aside and both the Union and employers cross-filed unfair labor practice charges alleged to have affected the election outcome.

The employers' charges of §8(b) violations were dismissed by General Counsel of the Board on the Union's consent to post a notice to refrain from any repetition and the employers' application to consolidate the charges by both sides for hearing was accordingly denied. The representation case was joined with the Union's unfair labor charges for a single hearing.

At the hearing the employers unsuccessfully argued economic necessity for their dismissal of 10 employees on April 2, stating they had returned to the 1970 employment level under the compulsion of operating losses sustained in the opening quarter of 1971.[3] The employers also asserted that the ten employees released were junior as measured by departmental seniority and separate employment at

---

2. The Administrative Law Judge held (A36),

> The election which was conducted on May 13, 1971, resulted in 35 votes cast for the [Union] and 32 votes cast against the [Union]. Twenty-three ballots were challenged, a sufficient number to affect the result of the election.

The official record of the vote is as given above. Since it does not seem to be merely a clerical error and the ten votes are obviously critical to the outcome, petitioners assume that the examiner must have counted the ten terminees twice, both as voting for the Union and as being among the challenges

3. *Federal*
(findings, A77-79)

	Sales	Income	Employees
Jan-Mar 1970	$383,000	$240,000 [240.00 ?]	66
Jan-Mar 1971	$416,000	($15,000)	75

Federal and Drivex. The employers' proffered evidence on offsetting Union misconduct, which was rejected except as to incidents relevant to voter qualification (A107-09).

The Administrative Law Judge set aside the stipulated voting list, (A88-90), upheld 12 challenges which reduced the unit size to 63 (A97), and sustained 10 of the 21 complaint charges against the employers, finding violations of §§8(a)(1), (3), and (5)[4] of the Act.

The §8(a)(1) unfair labor practices occurred in March before and after the appearance of the Union and, to the extent sustained by the Board and Court of Appeals, are detailed in Part I of the Circuit opinion, A8 to 10. These comprise an improper interrogation, two cases of unlawful surveillance of meetings, changing the duties and hours of four employees, an undue limitation on union solicitation in the plant, an implied promise of benefit, and a threat of dismissal of two employees for taking sales information out of the plant.

As to the validity of the April 2 discharges, the examiner held that the two companies were to be treated for employee seniority as a single pay unit and a plant-wide measure should have been used rather than departmental selection of the terminees (A76-84). While conceding that the employer had shown an economic basis for the dismissals, he concluded that on the whole evidence he would find the terminations were intended to be used by the employers as "a show of power" (A84) and therefore constituted a violation of §8(a)(3). The facts are discussed in the Circuit opinion at A10 to 13.

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4. Not charged in the complaint (JA9-18) but held to follow from the §8(a)(3) violation (A37).

The May 13 election result was set aside, the challenged ballots were ordered to be left sealed, and the examiner, stating that a fair rerun election would be impossible, recommended a Gissel bargaining order (A106-07).

Two members of the National Labor Relations Board panel generally adopted the Administrative Law Judge's recommendations, enlarging the unit by two and altering three rulings on challenges. The Board denied the employers' request to be heard on their claim of deprivation of due process in the exclusion of their evidence of Union unfair labor practices.

Chairman Miller dissented from his fellow members, concluding that the record showed the employers had demonstrated adequate economic reasons for the release of the 10 employees on April 2, and concluding that the sustained §8(a)(1) violations were not a sufficient basis for a compulsory bargaining order under *Gissel* guidelines (A31).

On review in the Eighth Circuit, Judges Stephenson and Lay deleted three strikers from reinstatement rights because of the Iowa conviction. With that exception, they directed enforcement of the Board's order, including the provision for compulsory bargaining (A14-15).

Judge Van Oosterhout dissented, concurring with Chairman Miller of the NLRB that the employer had shown adequate economic reasons for the release of the ten employees and that in any event compulsory bargaining was not justified under *Gissel* principles (A16).

Prior to the issuance of the Circuit opinion, the employers instituted an action for the damage caused by the Union and strikers and judgment in the amount of $18,851.95 was granted on a jury verdict by the Southern District of Iowa (A117).

REASONS FOR GRANTING THE WRIT

1

The Decision Below Is in Conflict with Gissel

Given a choice before this Court, the employers would of course agree with Chairman Miller and Judge Van Oosterhout that the release of ten girls on April 2, 1971 was an essential, or at least a reasonable business response to first quarter losses. And if this had been the decision, there could have been no serious claim below that any employer impropriety adversely affected the outcome of the May 13 election and the result of that election would have closed the question.

But that was not the decision. Panel majorities control the holdings of the Board and the Circuit in the same way that majority sentiment should govern employee selection of a bargaining representative under the Labor Management Relations Act. The question here is whether in an ambiguous situation like the present, you have held that the Act authorizes the issuance of a compulsory bargaining order in lieu of a statutory election without necessary recourse to a finding of reasonable relation between the unlawful practices and the election process.

In *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), you distinguished between the statutory purpose of the Act and the means used to measure employee sentiment in any given case. You held that the secret election, although a preferred method, was not the only permitted means of ascertaining a majority opinion, that in determining whether a refusal to bargain existed under Section 8(a)(5), the Board could use alternative methods if a fair election had been made impossible, 395 U.S. at 613-16. You found that

such an alternative existed in the evidence of Union card majorities which were on the facts of those cases a sufficiently trustworthy indication of employee preference. You required the Board in each case where an election was avoided in favor of a bargaining order, to state the reasons why the preferred election was rendered ineffective by the unlawful practices shown in the record, 395 U.S. at 620.

Did *Gissel* intend that the required finding of relationship could be satisfied by a formula conclusion to that effect by the Board, the sort of omnibus statement that the Fifth and Sixth Circuits have called "a litany, reciting conclusions by rote without factual explication", *N.L.R.B.* v. *American Cable Systems, Inc.*, 427 F. 2d 446, 449, *cert. den.* 400 U.S. 957 (1970); *N.L.R.B.* v. *East Side Shopper, Inc.*, 498 F. 2d 1334, 1336 (6 Cir. 1974)? The Circuits have mostly said "No", exemplified by the *American Cable* conflict with the Board as described in *N.L.R.B.* v. *Gibson Products Co. of Washington Par., La., Inc.*, 494 F. 2d 762 (5 Cir. 1974). The Courts of Appeals have read *Gissel* to require an affirmative Board explanation of the claimed relation,

> The Court in *Gissel* thus placed bargaining orders based on a card majority in a special category: an extraordinary remedy available to the Board to overcome the polluting effects of the employer's unfair labor practices on the electoral atmosphere. The order is not a traditional punitive remedy, but is a therapeutic one. It is not, therefore, the type of remedy which is automatically entitled to enforcement at any time after the occurrence of the unfair labor practice.
>
> *N.L.R.B.* v. *American Cable Systems, Inc., supra*, 427 F. 2d at 448.

This difference of view between the Board and the Circuits has led to repeated reversals of Board bargaining orders, e.g.,

D.C. Circuit: *N.L.R.B.* v. *Ship Shape Maintenance Co.*, 474 F. 2d 434 (D.C. Cir. 1972).

Second Circuit: *N.L.R.B.* v. *General Stencils, Inc.*, 438 F. 2d 894 (2 Cir. 1971), *after remand* 472 F. 2d 170 (1972); *N.L.R.B.* v. *World Carpets of New York, Inc.*, (hereinafter *World Carpets I*) 403 F. 2d 408, *after remand* 463 F. 2d 57 (hereinafter *World Carpets II*) (2 Cir. 1972); *N.L.R.B.* v. *M. H. Brown Co.*, 441 F. 2d 839 (2 Cir. 1971); *N.L.R.B.* v. *United Mineral & Chemical Corp.*, 391 F. 2d 829 (2 Cir. 1968).

Third Circuit: *N.L.R.B.* v. *Easton Packing Company*, 416 F. 2d 256 (3 Cir. 1969); *Krystyniak* v. *N.L.R.B.*, 415 F. 2d 125 (3 Cir. 1969).

Fourth Circuit: *Louisberg Sportswear Co.* v. *N.L.R.B.*, 462 F. 2d 380 (4 Cir. 1972); *N.L.R.B.* v. *Nu-Southern Dyeing & Finishing, Inc.*, 444 F. 2d 11 (4 Cir. 1971).

Fifth Circuit: *N.L.R.B.* v. *Gibson Products Co. of Washington Par., La., Inc.*, 421 F. 2d 156 (5 Cir. 1969), *after remand* 494 F. 2d 762 (1974); *Daisy's Originals, Inc. of Miami* v. *N.L.R.B.*, 468 F. 2d 493 (5 Cir. 1972); *N.L.R.B.* v. *American Cable Systems, Inc.*, 414 F. 2d 661 (5 Cir. 1969), *after remand* 427 F. 2d 446, *cert. den.* 400 U.S. 957 (1970); *N.L.R.B.* v. *Li'L General Stores, Inc.*, 422 F. 2d 571 (5 Cir. 1970).

Sixth Circuit: *Automated Business Systems* v. *N.L.R.B.*, 497 F. 2d 262 (6 Cir. 1974); *N.L.R.B.* v. *East Side Shopper, Inc.*, 498 F. 2d 1334 (6 Cir. 1974).

Seventh Circuit: *Peerless of America, Inc.* v. *N.L.R.B.*, 484 F. 2d 1108 (7 Cir. 1973); *New Alaska Development*

Corp. v. *N.L.R.B.*, 441 F. 2d 491 (7 Cir. 1971); *Ingress-Plastene, Inc.* v. *N.L.R.B.*, 430 F. 2d 542 (7 Cir. 1970); *L. C. Cassidy & Son, Inc.* v. *N.L.R.B.*, 415 F. 2d 1358 (7 Cir. 1969).

Eighth Circuit: *Dawson Metal Products, Inc.* v. *N.L.R.B.*, 450 F. 2d 47 (8 Cir. 1971); *N.L.R.B.* v. *Hart Beverage Co.*, 445 F. 2d 415 (8 Cir. 1971); *Arbie Mineral Feed Co.* v. *N.L.R.B.*, 438 F. 2d 940 (8 Cir. 1971); *N.L.R.B.* v. *Blades Manufacturing Corp.*, 344 F. 2d 998 (8 Cir. 1965).

Ninth Circuit: *Thiem Industries, Inc.* v. *N.L.R.B.*, 489 F. 2d 788 (9 Cir. 1973); *N.L.R.B.* v. *Coca-Cola Bottling Co. of San Mateo*, 472 F. 2d 140 (9 Cir. 1972); *Mechanical Specialties Company* v. *N.L.R.B.*, 414 F. 2d 898 (9 Cir. 1969).

Tenth Circuit: *Cannady* v. *N.L.R.B.*, 466 F. 2d 583 (10 Cir. 1972); *N.L.R.B.* v. *Miller Trucking Service, Inc.*, 445 F. 2d 927 (10 Cir. 1971).

Cf. Foss and Kobdish, *Gissel Packing and Bargaining Orders or "A Funny Thing Happened on the Way to the Election"*, 41 GEO. WASH. L. REV. 44 (1972); Perl, *The NLRB and Bargaining Orders: Does a New Era Begin with Gissel*, 15 VILL. L. REV. 106 (1970); Pogrebin, *NLRB Bargaining Orders Since Gissel: Wandering from a Landmark*, 46 ST. JOHN'S L. REV. 193 (1971).

One way a Court of Appeals may avoid such conflict and consequent delay is to substitute automatic approval of Board orders for the "whole record" review standard of §10(e) and (f) of the Act whenever the record is silent and bargaining orders are to be enforced. A principal proponent of this doctrine is the Eighth Circuit as illustrated by its classic restatement of the *Gissel* guidelines in *Arbie Mineral Feed Co.* v. *N.L.R.B.*, 438 F. 2d 940, 945 (1971),

(1) . . .

(2) Where the record is silent concerning the actual impact of the employer's unfair labor practices, we defer to the Board's exercise of discretion and grant enforcement.

Does the Board's *Gissel* interpretation coupled with this *Arbie* rule create a situation of compulsory selection of a bargaining representative by less than a majority? We think the present case shows that it does.

There were 36 Union cards signed in early March. None thereafter, even before April 2. One card signer resigned and left Madrid. 35 girls went on strike. There were 10 terminees and 25 votes on May 13 for the Union, again a maximum of 35, if all terminees are assumed to have voted Union. Three strikers were disqualified by the Court of Appeals for violence preceding the strike, i.e. 32. There were 32 votes against the Union, even allowing all 12 challenges sustained by the Administrative Law Judge. The Board admitted an additional three who presumably (the votes are still sealed) had voted against the Union, a total of 35. On the face of the record it is statistically evident that not one person changed their vote between March 15 (the card-counting date) and the election two months later, neither by reason of the acts of the employers nor of the Union.

The essence of *Gissel* is that a majority must have once existed in favor of a Union and be shown to have been destroyed thereafter by acts of the employers. Here the record demonstrates that every Union card eventuated in a Union vote and it is therefore impossible to state any rational basis for showing that any acts of these employers prevented the election of May 13 from being a fair one, or made it impossible to hold a fair rerun election.

To the extent that this Court did not authorize minority labor representation in *Gissel*, the Board's order and the Eighth Circuit *Arbie* rule are in conflict with your decision. The holding of the Administrative Law Judge effectively described the method used to avoid determination of employee sentiment:

> Inasmuch as the alternatives set forth above provide either that the Union win the election, in which case Respondent must bargain with it, or that the election be set aside, and the bargaining order issued, it is my recommendation that in order to save time, too much of which has already been spent on this matter, the challenged ballots should not be counted, but the election should be set aside, without further ado, and the bargaining order issued . . . . While it is true that a certification provides certain benefits to the Union, I believe that in this case, an order to bargain will provide benefits exceeding those which the Union would gain by achieving certification through the election process. Accordingly, I shall recommend that the election be set aside, the petition for election be dismissed and that a bargaining order issue (A106-07).

II

Should the Clean Hands Doctrine Restrict the Board's Choice of an Employee Bargaining Representative?

The Act makes it

> [A]n unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 157 . . . . [self-organization]
>
> 29 U.S.C. §158(b)(1)

and there can be no dispute with the asserted enforcement policy of the Board as stated in *Gissel*,

> A bargaining order will not issue of course, if the union obtained the cards through . . . coercion . . . .
>
> 395 U.S. at 592

which accords with the equitable nature of the injunctive forms of relief provided by 29 U.S.C. §160.

However, it does seem to be a fact that bargaining orders have been and presumably will continue to be, issued in situations where coercive union membership pressure is unrebutted, e.g. *World Carpets II*, and *United Mineral, supra*. And, if so, the bargaining order remedy is being granted under circumstances which in normal course would bar any petitioner from recourse to equity and therefore any appellate affirmance constitutes a departure from the usual course of judicial procedure.

In *Gissel* there was a discussion on card reliability in misrepresentation situations, (e.g. "you have to sign a card to be allowed to vote") but the only reference to direct voting coercion was the quotation of the Board policy as stated above. In distinction to *Gissel* the coercion issue does arise in this case. Although the Circuit denied enforcement of the Board's order to reinstate three strikers because they were convicted of using violence in recruiting, it nevertheless accepted the Board's discretion to require bargaining with a union which stood in exactly the same posture—both the District Court jury and the Iowa court having found that the criticized acts of the strikers were encouraged by and participated in by the Union. This result conflicts with holdings in other Circuits.

As early as 1939 you held that participation in coercive organization would disqualify striking employees from the

Act's remedy of job reinstatement, *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939). The correlative question of disqualifying the offending union from the card majority type of recognition was considered in *N.L.R.B.* v. *United Mineral & Chemical Corp., supra,* where it was held:

> It is exceedingly hard to believe that Congress meant to authorize the Board to require bargaining with a Union having a bare card count majority which has attempted to increase this or to enforce its claim to representation by hitting other employees or the employer on the head.
>
> 391 F. 2d at 841.

The same Circuit refused enforcement of a bargaining order in *World Carpets I,* upholding an employer's refusal to recognize a union holding 4 cards out of 5 employees. The Court's ruling was based on its uncertainty of whether union coercion had played a part in securing the cards. The case was remanded to require the Board to hear the employer's charges and to consider whether the union should be disqualified, and if not, whether a bargaining order was an appropriate substitute for an election and in what way it would further the policies of the Act.

> "[A] bargaining order is 'strong medicine' whose 'potentially adverse effect on the employees' §7 rights must not be overlooked'."
>
> Quoting *N.L.R.B.* v. *Flomatic Corp.*, 347 F. 2d 74, 78 (2 Cir. 1965), 403 F. 2d at 412.
>
> [T]he Board should not automatically issue a bargaining order in every [card majority] case without considering whether the policies of the Act will be effectuated thereby. *Id.*

On remand, in *World Carpets I*, the Board heard the employer's evidence of Union violence. but, again with Chairman Miller dissenting, it reinstated its earlier direction for compulsory bargaining, viewing the union misconduct as inconsequential.

In the present case, this *World Carpets I* decision of the Board (188 NLRB No. 10) was accepted by the Administrative Law Judge as being a "decision which rules this" and on that basis dismissed the argument made by these petitioners that misconduct by this Union should disqualify it as a compulsory representative of petitioners' employees (A108-09).

However, this selection of a controlling precedent by the examiner was ill-timed. The *World Carpets* employer brought his case back to the Second Circuit, which for a second time refused to enforce the Board's reinstated order to bargain, 463 F. 2d 57 (1972). Judge Friendly pointed out that the Board had again failed to give any explanation of the manner in which the employer's violations as found had made it impossible to hold a valid election. Citing recent comments which noted the Board's view of *Gissel* as generally adopting card count bargaining orders, 463 F. 2d at 62 n. 6, he added that in order to justify a bargaining order, even employer violations which could reasonably be shown to have prejudiced the reliability of a statutory election had to be weighed against the corresponding background of union misconduct.

Moreover, the facts in the present case go well beyond *World Carpets I* and *II*. Here a state court conviction of this Union for the use of violent methods of employee persuasion had preceded the hearing which led to the affirmed recommendation for compulsory bargaining. In the face of that decision the ruling eliminating the statutory election in favor of compelled bargaining with this Union could

only be intended as a punitive response to the findings of unfair labor practices against the employers. But a punitive order is not within Board powers,

> [The Act] did not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board is of the opinion that the policies of the Act may be effectuated by such an order . . . .
>
> . . . There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land.
>
> *Fansteel, supra,* 306 U.S. at 257-58.

It is petitioners' argument that the policy of the Act can only be effectuated by disqualifying any union from becoming an employee representative in any campaign where violence in organizing has been used. Any lesser compromise by the courts would necessarily lead unions to considering the calculated risk of using employee coercion in any given instance—particularly since there would be a high probability that many such cases would never be brought to court by employers for the sake of securing industrial peace.

Petitioners concede of course that the solution which they now suggest is neither directed nor forbidden by the words of the statute or specifically in terms by any court. Petitioners, however, say it is an implied remedy under the statute for acts defined as unlawful, and the immediacy of the situation is becoming a more common feature of labor organizing, *United Const. Wkrs., etc.* v. *Laburnum Const. Corp.,* 347 U.S. 656 (1954); *United Auto Workers,*

etc. v. *Wisconsin Emp. Rel. Bd.*, 351 U.S. 266 (1956); *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131 (1957); *Int'l Union [Auto Workers] etc.* v. *Russell*, 356 U.S. 634 (1958). In fact, review of labor tort opinions even suggests the possibility that certain unions may generally encourage such conduct as a matter of policy to create the kind of reputation which in itself would be of considerable value in securing employee cards in new campaigns, *United Mine Workers* v. *Meadow Creek Coal Co.*, 263 F. 2d 52 (6 Cir.), *cert. den.* 359 U.S. 1013 (1959); *White Oak Coal Co.* v. *United Mine Workers*, 318 F. 2d 591 (6 Cir. 1963), *cert. den.* 375 U.S. 966, *reh. den.* 379 U.S. 871 (1964); *Flame Coal Co.* v. *United Mine Workers*, 303 F. 2d 39 (6 Cir.), *cert. den.* 371 U.S. 891 (1962); *Price* v. *United Mine Workers*, 336 F. 2d 771 (6 Cir. 1964), *cert. den.* 380 U.S. 913 (1965); *Gilchrist* v. *United Mine Workers*, 290 F. 2d 36 (6 Cir.), *cert. den.* 368 U.S. 875 (1961). The intervening Union here, the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, and its predecessor, the United Packinghouse Workers, while not on a par with the Mine Workers on the judicial record, have at least achieved something of a reputation in this field, *United Packinghouse, etc. and Samuel W. Berry*, 153 NLRB 956 (1965); *Amalgamated Meatcutters, etc. and Davis Wholesale Co., Inc.*, 165 NLRB 264 (1967); *N.L.R.B.* v. *U.P.W. of A.*, 274 F. 2d 816 (5 Cir. 1960), *affirming* 123 NLRB 464 (1959); *Wilson Packing Co.*, New York Times, Dec. 10, 1959, at 33, Col. 1; Dec. 11, 1959 at 20, Col. 1; Jan. 8, 1960 at 12, Col. 1; *Iowa Beef Packers*, New York Times, Mar. 17, 1965, at 32, Col. 4; Dec. 17, 1969 at 37, Col. 5; Apr. 12, 1970, at 56, Col. 3; *Western Iowa Pork Co.*, New York Times, Apr. 10, 1965, at 15, Col. 6; *Coercion of Employers*, New York Times, Aug. 2, 1967, at 42, Col. 1; Apr. 17, 1969 at 39, Col. 2; Washington Post, October 17, 1971, at 1, Col. 5.

Declaring the extent to which this type of situation defeats national labor policy and shaping the means whereby it can be corrected constitutes an important question of Federal law which has not been, but should be settled by this Court.

> No opinion of the Supreme Court of the United States has recognized the right of a labor organization to use violent means to accomplish the lawful ends of plant organization. *Meadow Creek, supra,* 263 F. 2d at 63.

But equally, no opinion of this Court has attached terms to the use of organizing violence which would make it unprofitable to the unions concerned.

III

Were the Employers Deprived of Administrative Due Process in the Refusal to Hear Jointly the Cross-Charges of Employers and Union?

The Act requires that in any Board hearing of an unfair labor practice charge, the proceedings shall be conducted "in accordance with the Rules of evidence applicable in the district courts of the United States . . ." 29 U.S.C. §160(b). Proof of union coercion has been held to be relevant to the determination of a majority representative, *N.L.R.B.* v. *United Mineral & Chemical Corp., supra, Fansteel Metallurgical, supra, N.L.R.B.* v. *Dallas City Packing Co.*, 230 F. 2d 708 (5 Cir. 1956), accord, *World Carpets I and II, N.L.R.B.* v. *Lord Baltimore Press, Inc.*, 300 F. 2d 671 (4 Cir. 1962).

Under the statute a party's right to produce evidence shall not be limited, *Winchester Spinning Corp.* v. *N.L.R.B.*, 402 F. 2d 299 (4 Cir. 1968); *N.L.R.B.* v. *Indiana & Michigan Electric*, 318 U.S. 9 (1943) and therefore a full hearing of

the employer in a representation case is a due process requirement, *N.L.R.B.* v. *G. K. Turner Associates*, 457 F. 2d 484 (9 Cir. 1972); *N.L.R.B.* v. *Janler Plastic Mold Corp.*, 82 LRRM 2174 (7 Cir. 1972); *N.L.R.B.* v. *Millard Metal*, 472 F. 2d 647 (1 Cir. 1973); *Luminator Division of Gulton Industries, Inc.* v. *N.L.R.B.*, 469 F. 2d 1371 (5 Cir. 1972).

In *N.L.R.B.* v. *Ortronix, Inc.*, 380 F. 2d 737 (5 Cir. 1967), the Court said

> In our view there exist numerous substantial and material issues of fact—there is head-on clash between the company and Union allegations of irregularity in the two elections—which call for a formal hearing and the failure of the Board to provide one was a denial of procedural due process. See *United States Rubber Company* v. *N.L.R.B.*, 5 Cir., 1967, 373 F. 2d 606 . . . . On review of the Board's findings, we have discretion to require that the Board not shut off a party's right to produce evidence or conduct cross-examination material to the issues, as well as to see that a party's rights are not finally foreclosed until his case has been fairly heard.
>
> 380 F. 2d at 740-41.

In *Trade Winds Co.* v. *N.L.R.B.*, 413 F. 2d 1213 (5 Cir. 1969), *reh. den.* 424 F. 2d 549 (1970), the Fifth Circuit denied enforcement to a Board bargaining order for failure to hear the company's charges.

> The Company contends that these facts make out at least a prima facie case that there was "such serious threats of physical violence and coercive conduct that 'an atmosphere of fear and reprisal existed and [rendered] * * * a free election * * * impossible.'" *Shoreline Enterprises of America, Inc.* v. *N.L.R.B.*, 5 Cir., 1959, 262 F. 2d 933, 942 . . . .

> ". . . Viewed cumulatively, we have no doubt that the employer's objections charge that the election was conducted in less than the laboratory conditions so often promised by the Board and required by the Courts. We are also of the opinion that substantial and material factual issues exist which make it necessary that the employer be given a hearing and an opportunity to establish his charges * * *"
>
> Quoting *Home Town Foods, Inc.* v. *N.L.R.B.*, 379 F. 2d 241, 244 (5 Cir. 1967), 413 F. 2d at 1215.

By contrast in the present case, the employers' §8(b) charges against the Union starting with the state court conviction (18-CB-425) were dismissed by the Board's General Counsel on the Union's agreement to post a notice not to engage in such conduct in the future. On that basis, consolidation of hearings on the cross-charges of the employers and Union was then refused. The same proof was then offered by petitioners on the hearing of the §8(a) charges against them and excluded as irrelevant (JA223, 230, 858).

Petitioners sought review by the Board, arguing that this was a denial of due process. An oral hearing was refused (A20), and the issue was otherwise left unmentioned in the Board's decision. The due process claim was again raised by petitioners as Part IV of their brief to the Eighth Circuit. The Court of Appeals appeared to be at least aware of the background,

> These followings occurred in light of an atmosphere of other acts of terrorism on the part of Union adherents. (A13)

but made no reference to the petitioners' claim of due process denial for the exclusion of its evidence of such terrorism.

As the cited cases hold, union violence is relevant to the question of union certification. The exclusion of proof of this point violated the hearing requirements of the Act and denied petitioners due process. In ignoring this, the Court below departed from the usual course of judicial procedure and should be reversed.

CONCLUSION AND PRAYER

The Court below has misinterpreted this Court's ruling in *Gissel* and has, by its enforcement of a compulsory bargaining order under these circumstances, defeated the employee determination policy of the Act.

Moreover, this particular Union should, by reason of the violence it used to organize this plant, be disqualified to represent these employees under the implied employee freedom from coercion which the Act guarantees in the selection of a bargaining representative.

Finally, the Court below denied these petitioners due process of law in failing to hold that the refusal to hear the employers' charges against the Union was in derogation of the right given by the Act to submit evidence under the rules of evidence applicable in District Courts.

Petitioners therefore pray this Court for the issuance of a writ of certiorari to review the decision below and upon such review to remand the case to the Eighth Circuit to modify its judgment to such degree as may be appropriate to disqualify this Union and ascertain the true choice

of these employees by an uncoerced secret election under the Act.

Respectfully submitted,

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